

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN**

**MAGDALENE M. SMOOT and  
RYAN M. SMOOT,**

**Plaintiffs,**

**v.**

**MAZDA MOTOR OF AMERICA, INC. and  
THE TOKIO MARINE & FIRE INSURANCE  
CO., LTD.,**

**Defendants.**

**Case No. 02-cv-159-DRH**

**ORDER**

**HERNDON, District Judge:**

On October 14, 2005, the Court issued an order *sua sponte* (Doc. 60), allowing an extension of time until October 28, 2005, for Plaintiffs to respond to Defendants' Motion to Dismiss (Doc. 57). On August 31, 2005, Defendants filed their Motion to Dismiss, arguing that because the Court previously issued an order excluding Plaintiffs' expert witness from the case (Doc. 56), Plaintiffs' claims can no longer be proven.<sup>1</sup>

The Court felt that Defendants' Motion presented issues that should be properly addressed by Plaintiffs. Apparently, Plaintiffs did not share the same

---

<sup>1</sup> On February 5, 2004 the district court entered an order which adopted the Defendants' proposed findings of fact and concluded that expert testimony was needed to establish a *prima facie* case against the defendants. (Doc. 30.)

sentiment, as no responsive motion has been filed and Plaintiffs have not made any attempt to contact the Court for a further extension. Therefore, in consideration of Defendants' Motion to Dismiss, the Court will assume that Plaintiffs, through their inaction, conceded to the merits of the motion. Accordingly, Defendants' Motion to Dismiss is **GRANTED**. As such, the case is hereby **DISMISSED WITH PREJUDICE**.

**IT IS SO ORDERED.**

This 4th day of November, 2005.

/s/ David RHerndon  
**United States District Judge**